

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBERS: 03-0363, 03-0364**  
**Sales/Use Tax and Personal Income Tax**  
**For the Years 1999-2001**

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**ISSUES**

**I. Tax Administration - Best information available**

**Authority:** Ind. Code § 6-8.1-5-1; Ind. Code § 6-8.1-5-4

Taxpayer protests the imposition of sales tax and income tax with respect to an increase in its receipts.

**STATEMENT OF FACTS**

Taxpayer is an individual engaged in the business of selling food items at local fairs and festivals around Indiana. Taxpayer was audited by the Department in 2002 for the years 1999-2001. The Department conducted an audit based on one of the 2002 fairs at which Taxpayer did business. As a result of the audit, Taxpayer was assessed additional sales and income taxes, penalty and interest based on an underreporting of receipts. Taxpayer filed a protest, and a hearing was held. Additional facts will be supplied as necessary.

**I. Tax Administration-Best information available**

**DISCUSSION**

Taxpayer argues several assumptions made by the auditor were incorrect. Assessments by the Department are presumed correct, and the burden of showing the incorrectness of any assessment rests with the taxpayer. Ind. Code § 6-8.1-5-1(a).

First, Taxpayer argues that the prices used by the auditor were incorrect. In particular, the Department used prices that Taxpayer charged at a county fair in 2002, while the audit period was for 1999-2001. Taxpayer argues that the prices used by the Department overstated Taxpayer's sales for the years in question. While some inflation took place, it cannot be said that Taxpayer has overcome the presumption of the correctness of the audit.

Second, Taxpayer admits that the Department's auditor incorrectly applied the waste factor. Taxpayer argues that, though its waste might have been higher than the fifteen percent used by

the Department, that figure was reasonably close. Taxpayer does argue that significant waste does transpire due to the transient nature of Taxpayer's business and resulting issues with refrigeration, but this can be described as not sufficiently supported by Taxpayer.

However, Taxpayer argues that the waste factor was applied entirely to lunches (the meat item), while not applied at all to dinners (the meat item plus side dishes). In particular, Taxpayer argues that its food was cooked in advance, then served as lunches or dinners as the customers order their food. However, the audit stated that the dinners were cooked to order, and accordingly the waste factor was not applicable. The differences in methodology can best be described by the following example.

Taxpayer purchases 10,000 ribs. Seventy-five percent are sold as lunches, while twenty-five percent are sold as dinners. According to the auditor, 7,500 would be sold as lunches. However, fifteen percent would be wasted, resulting in 6,375 rib lunches sold. The remaining 2,500 would be sold as lunches. According to Taxpayer, 8,500 ribs are sold, for 6,375 lunches and 2,125 dinners.

Taxpayer has provided sufficient information to conclude that the auditor incorrectly applied the waste factor in its computation, and accordingly Taxpayer is sustained.

Third, Taxpayer argues that the percentages applied by the auditor to lunches and dinners as a percentage of overall sales, resulted in an excess percentage of sales being attributed to dinners. The auditor assessed tax based on a 75-25 split between lunches and dinners, while Taxpayer asserts that the breakdown was closer to 95-5. Taxpayer states that, when customers purchase items at the fairs at which Taxpayer did business, customers purchased only the meat, without anything else.

Here, Taxpayer's evidence, which consists of statements and not actual evidence of sales from fairs, either during the years of the audit or subsequent years, does not meet its statutory burden, and accordingly is denied.

Fourth, Taxpayer also argues that the auditor did not take into account other dispositions of ribs, such as promotional giveaways and discount or frozen sales. In particular, Taxpayer argues that certain sales made to qualifying groups (e.g., senior citizens) were not taken into consideration. Further, Taxpayer argues, Taxpayer sold significant quantities of frozen ribs and pork chops to persons who wish to buy in bulk, at prices significantly reduced from their normal resale prices.

With respect to this argument, the auditor apparently did account for the bulk sales of frozen items in determining Taxpayer's sales at fairs. With respect to Taxpayer's arguments concerning promotional sales, Taxpayer has not provided sufficient documentation to rebut the auditor's assessment.

Fifth, Taxpayer argues that the auditor's underreporting assumptions were incorrect. The Department auditor estimated the underreporting of receipts for 2001, and then applied the same percentage to 1999 and 2000. Taxpayer argues that each year should stand alone. Other than the assertion that the auditor's method was incorrect, Taxpayer has not otherwise provided

information to conclude that the auditor's methods were incorrect, and accordingly has not met its statutory burden of proof.

Sixth, Taxpayer argues that the auditor's assumption that Taxpayer's records were inadequate was incorrect. Ind. Code § 6-8.1-5-4 states:

- (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.
- (b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:
  - (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
  - (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction. In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.
- (c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.
- (d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

Taxpayer states, "[Indiana law] only requires the Taxpayer to keep such records as are necessary to make an accurate determination of the sales and income tax due." The Department agrees with the substance of this statement; the Department's disagreement is whether Taxpayer has kept those records. While taxpayers may have varying degrees of being able to keep records, the records of any taxpayer must be sufficient to permit the Department to reconstruct that taxpayer's business. Here, Taxpayer's records did not permit such a reconstruction, and accordingly Taxpayer did not rebut the correctness of the Department's assessment.

Taxpayer has further protested an income tax assessment with respect to added receipts. Taxpayer's adjusted gross income for the years in question is increased consistent with the discussion above for his additional sales.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part.